IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Shambhoo Giri vs. State of Rajasthan
(S.B.Criminal Appeal No.198/83)

Dated of Judgment:- 8th September,2006.

PRESENT

HON'BLE MR.JUSTICE MOHAMMAD RARIQ

Mr.Doongar Singh, Advocate for the appellant.
Mr.Rameshwar Dave, Public Prosecutor for the State.

BY THE COURT:-

REPORTABLE

This criminal appeal has been filed by the appellant against the judgment dated 3.5.1983 passed by the learned Special Judge, N.D.P.S. Cases, Udaipur thereby convicting him for offence u/s 161 IPC and sentencing to undergo two years' Rigorous Imprisonment and a fine of Rs.250/- and also convicting him for offence under Section 5 (1)(D)(2) of the Prevention of Corruption Act, 1947(for short “the Act of 1947”) and sentencing to undergo two years' Rigorous Imprisonment and a fine of Rs.250/-. In default of payment of fine for both the convictions, the appellant was directed to further undergo six months' Simple Imprisonment.

Factual matrix of the case are that one Fakirchand resident

of Lupdi submitted a written application to the Sub Divisional Magistrate, Pratapgarh(for short “the S.D.M.”) in which he alleged that head constable Shambhu Giri posted in the Police Station, Arnod was threatening him to lodge more complaints against him under Section 110 Cr.P.C. and was demanding a sum of Rs.200/- as illegal gratification. The S.D.M. kept the said application with him. However, one Raghuraj Singh , Advocate went to the house of the S.D.M. during lunch hours and produced before him currency notes of Rs.200/-. The S.D.M. put his signatures on each of these currency notes which this Raghuraj Singh later gave to Fakirchand. Complainant Fakirchand handed over said currency notes to head constable Shambhu Giri. On being informed of this fact, the S.D.M. immediately called Shambhu Giri to his chamber and asked him to produce currency notes which he received from Fakirchand. Accused produced these notes in presence of Raghuraj Singh, Vinodi Lal and one other person and handed over the notes to the S.D.M. These notes contained signatures of the S.D.M. The S.D.M. prepared recovery memo and thereafter sent the same with the currency notes to the Collector, Chittorgarh and also sent an information to the Superintendent of Police, Chittorgarh. The Anti Corruption Bureau thereupon registered a case u/s 161 IPC and Section 5(1))(D) and 5(2) of the Act of 1947 and later on submitted a charge-sheet against the accused appellant in the Court of Special Judge, Anti Corruption Cases, Udaipur . The learned Special Judge vide his judgment dated 3rd May, 1983 convicted and sentenced the accused-appellant in the manner as indicated above. Hence this appeal.

I have heard Mr.Doongar Singh, learned counsel for the appellant and Mr.Rameshwhar Dave, learned Public Prosecutor for the State and perused the record.

Mr.Doongar Singh, learned counsel for the appellant has argued that the learned Special Judge has committed illegality in relying upon the alleged recovery of currency notes in as much as the S.D.M. had no legal authority to hold the trap in relation to the cases under the Act of 1947. He argued that while the application is alleged to have been handed over to the S.D.M. earlier, the currency notes were submitted to him at much later point of time. Case of the prosecution is that the application was submitted to Kuldeep Singh, S.D.M. in his office and thereafter Raghuraj Singh, Advocate went to his residence during lunch hours to give him the currency notes while Fakirchand stood outside. On this aspect however there were number of contradictions in the various statements of the prosecution witnesses. He invited attention of the Court to the statement of P.W. 4 Fakirchand especially to the portion in which he stated that the accused demanded a sum of Rs.500/- whereas in the application submitted before the S.D.M., Fakirchand restricted the demand of the accused to Rs.200/- only. It has been argued that P.W. 4 Fakirchand in his statement admitted that when he gave Rs.200/- to accused Shambhu Giri, Rama was also present with him at that time. Mr.Doongar Singh argued that defence of the accused-appellant was that the amount of Rs.200/- was given to him by Fakirchand for being given to Hari Ram because Fakirchand owed some money to him(Hari Ram). This defence was disclosed by the accused Shambhu Giri at the first available

opportunity immediately when the S.D.M. asked him to produce currency notes. D.W. 1 Rama whose presence has been admitted by none other than decoy Fakirchand himself has provided corroboration to this defence when he stated that Fakirchand gave this amount of Rs.200/- to accused Shambhu Giri in his presence for being paid to Hari Ram with the promise that he would give remaining 200/- at a later stage. In his statement, D.W. 1 Rama further stated that Hari Ram had given a contract of certain construction work for a total amount of Rs.1500/-,out of which he gave Rs.400/- in advance to Fakirchand, who however failed to execute the contract . Hari Ram has been examined as D.W. 2. He was also corroborated the defence of the accused-appellant that he had given a contract to Fakirchand and paid advance and that this amount of Rs.200/- was given by Fakirchand to the accused Shambhu Giri to be paid to him. In his cross-examination,P.W. 6 Kuldeep Sharma has admitted this much when the accused produced currency notes in his chamber he stated that this money was of their mutual affairs. He referred to cross-examination of P.W. 7 Raghuraj Singh where he admitted that when Fakirchand gave the money to Shambhu Giri, one more person was present with them and that person according to the learned counsel was none other than D.W. 1 Rama. He has placed very strong reliance on the last few lines of the cross-examination of P.W.7 Raghuraj Singh where he stated that accused Shambhu Giri while producing currency notes before the S.D.M. stated that Fakirchand had given this money to him for giving it to Hari Ram because he had taken loan from him.

Reference has been made to the statement of P.W. 5

Vinodilal who in his cross-examination has stated that at the time of recovery and preparation of recovery memo in the chamber of S.D.M., Moinuddin, Station House Officer, Pratapgarh was also present there. On the basis of this statement, Mr.Doongar Singh argued that S.H.O., Pratapgarh has not been deliberately produced in evidence by the prosecution so as to suppress the genesis of the incident. He has referred to various contradictions in the statements of the prosecution witnesses and argued that P.W. 4 Fakirchand in his statement all along maintained that total illegal gratification demanded by the accused was Rs.500/- whereas in the complaint made to the S.D.M., he referred to this amount as only Rs.200/-. P.W. 4 Fakirchand in his cross-examination has stated that on account of tension he might not have told Raghunath Singh that accused Shambhu Giri was demanding Rs.500/- as gratification. He has invited my attention to the statement of P.W. 6 Kuldeep Sharma who in his examination in chief has stated that application Ex. P/6 was presented to him while he was in office and then he went to residence during lunch and this application at that time was lying in the drawer of his office table. When Raghuraj Singh came to his residence, his client Fakirchand stood outside. Raghuraj Singh produced before him the currency notes on which he marked his initials. In cross-examination however P.W. 6 Kuldeep Sharma has stated that the application was presented to him when he was at his residence. After sometime he went to his office. As against this, P.W. 7 Raghuraj Singh in his examination-in-chief has stated that he went to the residence of S.D.M. because his residence was just in front of his office. He submitted the application and also the currency notes before Mr.Kuldeep Sharma, S.D.M. There,who made his initials on such notes

and entered the number of currency notes in his diary. The S.D.M. retained the application and returned the currency notes with the instruction that when accused demand money, Fakirchand should give these notes to him.

With the help of these contradictions, Mr.Doongar Singh, learned counsel for the appellant argued that the prosecution has not been able to prove as to where the application was handed over to the Sub Divisional Magistrate, whether in the office or at his residence. He argued that accused-appellant was merely a head constable and had no authority to file complaint u/s 110 Cr.P.C.. In assailing the impugned judgment , the learned counsel has argued that the learned trial Court has not only did not correctly appreciate the prosecution evidence but has also mis-read the statement of P.W. 7 Raghuraj Singh where he admitted that accused appellant in his first available opportunity before the S.D.M. when he produced the currency notes stated that Fakirchand gave him a sum of Rs.200/- for being given to Hari Ram.. But, the learned Special Judge has concluded that this was a typing mistake because P.W. 7 Raghuraj Singh meant to deny any such defence was taken by the accused appellant before the S.D.M. but due to typing error ”Nahin”(no) has not been typed out in the statement. Learned counsel for the appellant argued that if there had been any such typing mistake in recording statement of P.W. 7 Raghuraj Singh, the Public Prosecutor could make a request to re-examine or re-call of the witness even at a subsequent stage before the judgment was delivered. The learned Special Judge on his own could not hold that there was any such typing

error in the statement of P.W. 7 Raghuraj Singh and on that basis could not read that part of statement of Raghuraj Singh in a negative form even though he gave such statement in positive form. Mr.Doongar Singh has relied upon the judgments of the Hon'ble Supreme Court in Sultan Singh vs. State of Rajasthan, reported in WLN 1969 p.25, Sitaram Vs. State of Rajasthan, reported in AIR 1975 p.1432 and Mansingh vs. Delhi Administration, reported in 1979 S.C.C. (Criminal) p.528 and with the help of these judgments argued that presumption u/s 4 of the Act of 1947 that money recovered from the accused was received as illegal gratification stood rebutted by the explanation given by the accused that he received such amount from P.W. 4 Fakirchand for being given to Hari Ram. This defence taken by the accused-appellant at the earliest available opportunity has been probabilised by evidence of not only star witness of the prosecution P.W.7 Raghuraj Singh but also by statements of D.W.1 Rama and D.W. 2 Hari Ram. He therefore prayed that the judgment passed by the learned trial Court be set aside and the accused appellant be acquitted of all the charges against him.

On the other hand, Mr.Rameshwar Dave, learned Public Prosecutor for the State argued that so called contradictions pointed by the learned counsel for the accused-appellant were only minor and negligible in nature. The factum of demand and recovery of illegal gratification has been proved by overwhelming evidence. He referred to the statement of P.W. 4 Fakirchand wherein he has stated that he was frequently arrested and subjected to number of proceedings u/s 110 Cr.P.C. and accused-appellant was demanding a sum of Rs.500/- else

he would continue to be harassed in this manner. Mr.Rameshwar Dave argued that P.W. 4 Fakirchand, P.W.5 Vinodilal, P.W. 6 Kuldeep Sharma and P.W. 7 Raghuraj Singh have also proved both demand and recovery. P.W. 5 Vinodilal has categorically stated that when the accused was required to produce currency notes, he did not state anything else and did not say that he accepted the money for being paid to Hari Ram. Learned Public Prosecutor also referred to the statement of P.W. 6 Kuldeep Sharma and argued that when Kuldeep Sharma inquired from the accused appellant as to why he accepted the bribe, he admitted having committed a mistake . Apart from the application Ex.P/6, he has referred to Ex.P/7 which is the list of notes, Ex.P/8 sample of seal, Ex.P/9 containing signatures of S.D.M., Ex.P/10 memo of proceedings and Ex.P/12 diary in which number of currency notes were entered . He has also relied on the statements of P.W. 7 Raghuraj Singh and argued that he has also fully supported the prosecution version. As regards the admission made by him that accused stated before the S.D.M. that Fakirchand gave this money to him for giving it to Hari Ram, he argued that the learned Special Judge has rightly held this to be result of typing mistake because the statement of P.W. 7 Raghuraj Singh has to be read in its entirety and in this line of statement, word “Nahin”(no) has been inadvertently left out from being typed. He therefore argued that the present appeal preferred by the appellant deserves to be dismissed.

I have given my thoughtful consideration to the arguments advanced by learned counsel for the parties and perused the record.

According to the prosecution, the motive with which the accused appellant is alleged to have demanded illegal gratification from Fakirchand was to save him from continued proceedings u/s 110 Cr.P.C. Accused Shambhu Giri was only working as head constable. The decision to lodge a complaint u/s 110 Cr.P.C. is required to be taken at the level of Station House Officer of the Police Station. This motive assigned by the prosecution therefore does not appear to be logical. This shall have to be judged in the light of the character of the person who has made such allegation. P.W. 4 Fakirchand in his statement has admitted that during the past two years, he had been arrested and subjected to proceedings us 110 Cr.P.C. on at least four occasions. While he has stated that accused-appellant demanded from him a sum of Rs.500/- as bribe, in the complaint made to Kuldeep Sharma, S.D.M. he simply stated that accused was demanding from him a sum of Rs.200/- and therefore he was producing such amount of Rs.200/- which the S.D.M. should sign and return him. He eventually submitted currency notes of Rs.200/- to S.D.M. for his signatures. His counsel P.W. 7 Raghuraj Singh who was instrumental in arranging this trap for him, has stated that he went to the residence of S.D.M. with the application around 12 in the noon and at that time also produced currency notes and obtained signatures of the S.D.M. P.W. 6 Kuldeep Sharma. P.W. 6 Kuldeep Sharma has however taken shifting stands on this aspect and has stated that he received such application in his office and thereafter when he went to his residence during lunch, the application was lying in the drawer of his table in office. Raghuraj Singh came to him with currency notes and his client Fakirchand stood outside. In cross-examination however he has stated that this

application was produced before him at his residence. P.W. 5 Vinodilal has stated that at the time of recovery of the currency notes, S.H.O. , Pratapgarh was present in the chamber of S.D.M. but the prosecution has not produced the S.H.O. in evidence. P.W. 4 Fakirchand in his statement has categorically stated that Rama was also present on that day as he was to appear with him in proceedings u/s 110 Cr.P.C. . He has admitted that when he gave this amount of Rs.200/- to accused-appellant, Rama Chamar was also with him. This fact also provide credence to the statement of P.W. 4 Fakirchand when P.W. 7 Raghuraj Singh stated that one more person was present with Fakirchand when he gave money to accused Shambhu Giri . P.W. 7 Raghuraj Singh has also categorically stated that when accused Shambhu Giri produced the currency notes before the S.D.M., he at that very time stated that Fakirchand had given this money to him for being paid to Hari Ram whom he was due to pay such amount. In making such statement, P.W. 7 Raghuraj Singh has clearly probablised the defence of the accused appellant which he offered at the earliest point of time.

D.W. 1 Rama has stated that Fakirchand had given a sum of Rs.200/- to accused Shambhu Giri in his presence and asked him to give this money to Hari Ram. He stated that Hari Ram had given a contract for certain construction work to Fakirchand for a sum of Rs.1500/- and paid a sum of Rs.400/- to him in advance. When Fakirchand failed to execute the contract, he was to refund this amount of Rs.400/- to Hari Ram. While giving this amount to Shambhu Giri, Fakirchand also told him that he shall also give remaining Rs.200/- later. Hari Ram who has been

examined by the defence as D.W. 2 has stated that he has so far not received the amount of Rs.400/-. He stated that he had given a contract to Fakirchand for constructing a boundary wall of his “baara” for a sum of Rs.1500/- and paid a sum of Rs.400/- as advance to him. He gave this money to Fakirchand because he was doing such work. When once he saw Fakirchand in police custody, he demanded from his due amount, but he expressed his inability to pay the amount immediately and promised that either he would himself return the amount or would give it to the person nominated by Hari Ram . Hari Ram further stated that he told Fakirchand to give this money to the accused appellant Shambhu Giri. Later, the accused appellant complained that due to him(Hari Ram), he has been falsely implicated in a criminal case.

The appellant in his statement u/s 313 Cr.P.C. has reiterated the defence which he had taken at the earliest point of time that Fakirchand gave him a sum of Rs.200/- for being given to Hari Ram. In his statement, he has also stated that Fakirchand had falsely implicated him in this case because he had arrested him(Fakirchand) on 25.8.1977 and further that when he gave this money to Fakirchand, Rama Chamar was also present there. He has stated that when he produced currency notes before the S.D.M., Moinuddin,Station House Officer of the Police Station was also present there.

Their Lordships of the Hon'ble Supreme Court in State of Andhra Pradesh vs. V.Vasudeva Rao, reported in (2004) 9 S.C.C. 319 while considering the scope of Section 4 of the Act made a finer

distinction between the expressions “may presume” and “shall presume” and held that presumption falling under the former category are compendiously known as “factual presumptions” or “discretionary presumptions” and those falling under the latter as “legal presumptions” or “compulsory presumptions”. It must have the same import of compulsion. Their Lordships in para 18 of the said judgment while discussing as to what is the legal meaning of presumption held as under :-

> “18. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.”

In order to appreciate the true contents and meaning of Section 4 of the Act relating to presumption, its reproduction herein shall be apt:-

> “4(1) Presumption where public servant accepts gratification other than legal remuneration:(1) Where in any trial or an offence punishable under section 161 or section 165 of the IPC or of an offence referred to in clause(a) or clause(b) of sub-section(1) of Section 5 of this Act punishable under sub-section (2) thereof, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification(other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable

> thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

Question with regard to probability of defence and resultant rebuttal of presumption u/s 4 of the Act came to be considered by their Lordships of the Hon'ble Supreme Court in Sultan Singh vs. State of Rajasthan (supra) in which charge against the Patwari was for acceptance of bribe of Rs.100/- for supplying copies of Khasra Teeps to the decoy. The defence of the accused Patwari was that this amount was paid to him by the decoy towards arrears of land revenue. Both the trial Court and this Court accepted the version of the prosecution. When the matter went to the Hon'ble Supreme Court, their Lordships held that the courts below neither analysed the record nor shifted the probabilities. The Hon'ble Supreme Court held that the complainant in that case alongwith the trap party went for search of the accused and ultimately found him in a certain dispensary where he took the accused to an inner room and passed on a hundred rupees note. He did not allow the witnesses who accompanied him to observe the payment. In the circumstances, their Lordships held that decoy in fact was an accomplice and therefore his testimony could not be relied upon as it was not corroborated by any other evidence or circumstance. Their Lordships accepted the defence of the accused by holding that the decoy pretended ignorance about his arrears of land revenue but this fact was conclusively proved and was not disputed even before the Supreme Court nor before any of the courts below. Their Lordships referred to the statement of Dy.S.P., Anti Corruption

Department who asked the accused -appellant immediately when he came out of the inner room of the clinic as to what for he had accepted the money, the accused immediately came out with a defence that such money was paid to him by the complainant towards arrears of his land revenue. In the facts of the case, their Lordships held that “it is difficult to believe that the appellant could have concocted his defence within such a short time.” Similarly, the Hon'ble Supreme Court in the case of Sita Ram vs. State of Rajasthan(supra) while examining the scope and import of Section 161 IPC held that when the facts that the accused was a public servant and obtained gratification are proved, then a rebuttable presumption arises in respect of the fact that such gratification was for the motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official functions, favour or disfavour to the person. Their Lordships held that on mere recovery of certain money from the person of an accused without the proof of its payment by or on behalf of some person to whom official favour was to be shown, the presumption cannot arise. In the present case also the prosecution has failed to prove that accused appellant being a government servant of the status of head constable only, how possibly could he accept the gratification for motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to the person. Only Station House Officer of the Police Station concerned was competent to initiate proceedings u/s 110 Cr.P.C. Nothing has been brought on record that the accused appellant accepted such gratification on his behalf.

In Man Singh vs. State of Rajasthan(supra) their Lordships of the Supreme Court held that u/s 4 and 5(1)(D) and 5(2) of the Act of 1947, the accused is not required to prove his defence by strict standards of beyond reasonable doubt but it is sufficient if he offers an explanation or defence which is probable and once this is done, the presumption u/s 4 stands rebutted. In the present case also the defence of the accused having been probabilised by none other than the star witness of the prosecution P.W. 7 Raghuraj Singh, the defence of the accused appellant has clearly been proved as required by Section 3 of the Evidence Act.

Their Lordships of the Hon'ble Supreme Court in the case of Punjabrao vs. State of Maharashtra, reported in (2002) 10 S.C.C. P.371 while examining the explanation offered by the accused on a similar charge which was found to be probable, reasonable and acceptable by the trial Court which acquitted him which on appeal however was reversed by the High Court, held that “accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability.”

The view taken by the Hon'ble Supreme Court in the case of Punujabrao Vs. State of Maharashtra(supra) has recently been reiterated by their Lordships of the Hon'ble Supreme Court in T.Subramanian vs. The State of Tamil Nadu, reported in AIR 2006 S.C. p.836. In para 7 of the said judgment, their Lordships observed as under :-

“Mere receipt of Rs.200/- by the appellant from PW-1 on

10.7.1987(admitted by the appellant) will not be sufficient to fasten guilt under Section 5(1)(a) or Section 5(1)(d) of the Act, in the absence of any evidence of demand and acceptance of the amount as illegal gratification. If the amount had been paid as lease rent arrears due to the temple or even if it was not so paid, but the accused was made to believe that the payment was towards lease rent due to the temple, he cannot be said to have committed any offence. If the reason for receiving the amount is explained and the explanation is probable and reasonable, then the appellant had to be acquitted, as rightly done by the Special Court. In Punjabrao vs . State of Maharashtra(2002(1) SCC 371), the accused, a patwari, was on a campaign to collect loan amounts due to Government. The complainant therein was admittedly a debtor to the Government. The accused explained that the amount in question was received towards loan. This Court accepted such explanation(though such explanation was not immediately offered as in this case, but was given only in the statement under Section 313) holding thus:-

> *"It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount, the question that arise for consideration is whether that explanation can be said to have been established. It is further clear that the accused is not required to establish that his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by pre-ponderence of probability."*

In Chaturdas Bhagwandas Patel vs. The State of Gujarat (AIR 1976 SC 1497), this Court held that the burden that rests on an accused to displace the statutory presumption that is raised under Section 4(1) of the Act, is not onerous as that cast on the prosecution to prove its case. But such burden has to be discharged, by bringing on record evidence, either direct or circumstantial , to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as is referred to in Section 161, IPC.

In State through Inspector of Police, Andhra Pradesh vs. K.Narasimachary (2005(8) SCALE 266), we have reiterated the well recognized principle that if two views are possible, the appellate Court should not interfere with the acquittal by the lower court; and that only where the material-on-record leads to a sole and inescapable conclusion of guilt of the accused, the judgment of acquittal will call for interference by the appellate Court."

A similar view was taken by their Lordships in M.Abbas vs. State of Kerala, reported (2001) 10 S.C.C. p..103 wherein it was held that "where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities."

In my view, there was absolutely no warrant for the learned Special Judge to have read in the statement of P.W. 7 Raghuraj Singh what in fact was not stated by him. A version which he did not give, could not be read in his statement by presuming that there appeared to be some typographical error in the last portion of the statement where P.W. 7 Raghuraj Singh has stated that accused on being asked told the S.D.M. that Fakir Chand gave him the money for being paid to Hari Ram. The learned Special Judge in my view has clearly erred in law by observing that word "Nahin"(no) could not be typed out due to clerical error while recording the statement of P.W. 7 Raghuraj Singh. The prosecution had taken no steps to either re-examine P.W. 7 Raghuraj Singh then and there or to recall him at any stage thereafter before the judgment. The learned Special Judge therefore committed an error of law in making out a case for the prosecution by taking approach which cannot be approved.

A cumulative examination of entire evidence of the prosecution in light of the defence set up by the accused clearly show (i) that star witness of the prosecution namely P.W. 7 Raghuraj Singh has admitted that the accused took such a defence at the earliest and at the first point of time when he produced the currency notes (ii) that P.W. 6

Kuldeep Sharma has stated this much that the accused told him that this money was relating to their personal affair (iii) that decoy P.W. 4 Fakirchand admitted presence of D.W. 1 Rama with him when he paid the sum of Rs.200/- to the accused appellant (iv) that P.W. 7 Raghuraj Singh also admitted presence of one more person with Fakirchand when he gave the amount of Rs.200/- to accused appellant (v) that D.W. 1 Rama in his statement provided corroboration to the defence set up by the accused appellant and ;(vi) that D.W. 2 Hari Ram has also provided corroboration to such defence when he admitted that he had given certain contract for construction of boundary wall to Fakirchand and paid a sum of Rs.400/- as advance. When it was difficult to recover the amount, he asked Fakirchand to give this money to accused appellant Shambhu Giri. The defence of the accused appellant having been so probablised, presumption of Section 4 of the Act of 1947 that the money recovered from the accused appellant was that of illegal gratification stood rebutted. It was then for the prosecution to bring home the guilt of the accused by required degree of beyond reasonable doubt.

Two important factors thus emerge out of any basis of the entire prosecution evidence namely; (1) that the defence which the appellant has taken was immediately taken at the time when he was asked to produce the currency notes by P.W. 6 Kuldeep Sharma, S.D.M. in his chamber (2) that the defence of the accused appellant taken in his statement u/s 313 Cr.P.C. has been probabilised by the statements of P.W. 4 Fakirchand, P.W. 7 Raghuraj Singh , D.W. 1 Rama and D.W. 2 Hari Ram as discussed hereinabove. The appellant in this case has been

charged for committing offences u/s 161 IPC and Section 5(1)(d) and 5(2) of the Act of 1947. Although, the factum of recovery of a sum of Rs.200/- from the appellant is not in doubt. In fact the appellant himself in his defence has admitted having receiving such amount from Fakirchand. His defence however is that Faikirchand had given him this money for being given to Hari Ram. A careful study of Section 4(1)(d) of the Act of 1947 would make it clear that presumption arising u/s 4(1) is a rebuttable presumption and such presumption arises only in regard to cases falling u/s 161 IPC or for an offence u/s 5(1)(A) or (B) of the Act of 1947. So far as the offence u/s 5(1)(d)(2) of the Act of 1947 is concerned, such presumption cannot be raised against the appellant for the said offence. A question would however arise whether in the facts of the present case, presumption can be raised against the appellant with regard to offence u/s 161 IPC or if raised, whether the appellant has been able to rebut such presumption by the defence he has produced. As already noticed, the presumption raised u/s 4(1)(d) of the Act of 1947 in reference to an offence u/s 161 IPC is a rebuttable presumption. The entire prosecution case hinges on the allegation that the accused-appellant demanded money from Fakirchand as illegal gratification in exchange of assurance for not subjecting again him to proceeding u/s 110 Cr.P.C. No evidence has been brought on record that S.H.O. of the Police Station was also privy to any such assurance held out by the appellant to Fakirchand not even a suggestion to that effect given. Not only this, the explanation given by the appellant at the earliest point of time when he was made to produce the currency notes before the S.D.M. and in his own statement u/s 313 Cr.P.C. has been amply probabilised in view of the evidence

discussed above.

In view of catena of judicial pronouncements noticed above, It is now well settled proposition of law that an accused is not required to prove his defence beyond reasonable doubt but he has to prove such defence only by preponderance of probabilities. It is this degree of difference in the required standard of proof that places limited onus onto the accused to merely probalise his defence and not to prove it beyond reasonable doubt. In the facts of the present case, such presumption has been successfully rebutted and onus thereof has been duly discharged by the appellant more particularly when the prosecution has failed to prove as to on what authority of law, the accused-appellant could held out the alleged assurance . At the same time however the prosecution has failed to prove the offence with which the appellant has been charged, beyond reasonable doubt thus entitling him to benefit of doubt.

For what has been discussed above, the present appeal deserves to be allowed and is hereby allowed and the impugned judgment is set aside. Consequently the conviction and sentence recorded therein are also set aside. Bail bonds of the appellant and sureties shall stand discharged.

(MOHAMMAD RAFIQ),J.